Supreme Court
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No. 00-

IN THE

Supreme Court of the United States

MELVIN WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether sending a jury, unable to decide during deliberations whether the lone witness could see a gun from a window, to the scene to look through that window, and become 12 witnesses, is merely a "bare inspection," or is the taking of evidence, which, without the defendant present, without cross-examination of the "witnesses," and without the chance to argue the new evidence to the jury, violates the Sixth Amendment rights to confrontation, fair trial, and effective assistance of counsel, and the Fifth Amendment right to due process?

II. Whether, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the "prescribed statutory maximum" for federal sentences is the maximum sentence under the statute or the maximum sentence under the Sentencing Guidelines, which are promulgated pursuant to congressional mandate, with the force and effect of law, and are just as binding as if the sentence was set forth in the statute?

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the court finds no security reason for shackling, yet shackles anyway because of "regulations," as part of the Sixth Amendment right to a fair trial and the Fifth Amendment right to be presumed innocent; (3) a defendant's right to cross-examine witnesses, even if they are also jurors, as part of the Sixth Amendment right to confrontation; and (4) a defendant's right to have counsel: (a) present when evidence is received; and (b) argue the impact of evidence during closing argument, as part of the Sixth Amendment right to effective assistance of counsel. 7

II. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court recognized that its holding would present the next due process issue of whether the "prescribed statutory maximum" for federal sentences is: (1) the maximum sentence under the statute; or (2) the maximum sentence under the Sentencing Guidelines, promulgated pursuant to congressional mandate, with the force and effect of law, and just as binding as if the sentence was set forth in the statute. Petitioner was sentenced beyond the maximum amount

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permissible for the offense charged, submitted to the jury, and found beyond a reasonable doubt. Petitioner thus presents this due process issue, and every federal judge, prosecutor, defense counsel, and defendant needs this question answered. 18

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

During deliberations, the jury could not decide criminal agency because it could not decide whether the Government's lone criminal agency witness could have seen, from the window, that which she purported to see. The district court (per Garbis, J.) ruled orally, over petitioner's objection, that the jurors, in groups of four, would be permitted to go into the room and look out the window, with neither court personnel, nor the defendant, present, in order to determine whether the witness could have seen what she testified she saw.

At sentencing, the district court (per Garbis, J.) enhanced the sentence, beyond the maximum permitted under the federal Sentencing Guidelines, based on two factors (obstruction of justice and crime of violence) for which petitioner was not charged and which the jury was never asked to consider.

The court of appeals affirmed the district court in an unpublished per curiam opinion. As to the first issue, the court ruled: "[T]he district court committed no reversible error in permitting the jury to view the scene without requiring the presence of the defendant, [and] no aspect of the manner in which the jury view was conducted prejudiced [petitioner]." App. 2a. As to the second issue, the court ruled: "[Petitioner's] reliance on *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), to challenge these enhancements is misplaced because the enhancements did not increase [petitioner's] sentence beyond the applicable statutory maximum." *Id.*

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on January 24, 2001, and denied the petition for rehearing and rehearing en banc on February 8, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The first issue is based on the United States Constitution and is not based on statutory provisions. The second issue is based on both the United States Constitution and 18 U.S.C. §§ 922(g), 924(e)(1), and the federal Sentencing Guidelines, U.S.S.G. §§ 3C1.1, 4B1.4, which are reprinted in the Appendix at App. 33a-38a.

STATEMENT OF THE CASE

Petitioner was charged, in the United States District Court for the District of Maryland, in a one-count indictment, with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). After a five-day trial resulted in a hung jury, petitioner was retried, on the same indictment, and found guilty on October 26, 1999. Petitioner was not charged with either obstruction of justice or a crime of violence.

The underlying facts are as follows: On March 8, 1999, at about 9:30 p.m., the police, having responded to a 911 call for a possible assault, arrested petitioner and seized a 9mm gun from his vehicle. The Government's evidence of criminal agency was limited to the testimony of one alleged eyewitness, Raynell Pompey, whose testimony produced different versions at the grand jury, the first trial, and the

second trial. Eight days after the incident, she told the grand jury she was inside her home, saw petitioner from her window at 15 feet, and did not see a gun. The police report indicated that it was impossible to see the street corner from her window and that the distance was 55 feet. Six months later, at trial, she testified she saw a gun while outside but had not told that to the grand jury. At the second trial, she testified she saw a gun from her window.

In addition to the witness's credibility, petitioner argued the inability of the witness to have viewed the alleged scene from her window because of the extreme angle and the darkness at 9:30 p.m. During rebuttal, a detective testified he looked through the window and could see the general area.

After the case was closed, but prior to jury instructions and closing argument, a juror's note stated: "[I]t is important to actually visit the crime scene and see the view outside the window of 1405 because what one person sees, another may not be able to see. So my question is can we visit the scene and look out of the window of 1405." App. 16a. Defense counsel responded: "[T]he question that [the juror] asked is pregnant with the reason as to why we shouldn't go because what one person sees, another may not be able to see. I mean the issue is not what the jurors see. It's what Raynell Pompey saw. That's the issue." App. 16a.

The court polled the jury, which indicated that a majority did not want to look out the window. App. 19a. The court stated: "[I]f it turns out in the course of deliberations that you decide or some jurors decide that in order to reach a final decision, they have to look out the window, then you'll let us know and we'll be able to arrange that." App. 19a.

When deliberations could not produce a verdict, the jury changed its mind, and the court permitted the jurors, in groups of four, to look out the window to decide whether they could have seen someone at the corner and could have seen whether that person had a gun. App. 22a. The jury apparently recognized the difficulty in viewing the scene from the window, combined with the witness's inconsistencies, and realized that it could not resolve the case on the testimony before it. Therefore, each juror wanted to look through the window and obtain his or her own personal view of the alleged crime scene. Each juror would become a witness, independently looking through the window to determine whether that juror could see what the witness alleged to see.

Petitioner was not present because the court denied him the right to be present unless he was shackled. The court stated: "If [petitioner] wants to come to the scene, the marshals will take him. Now he's going to be shackled." Defense counsel protested. The detective told the judge: "If you would like, I can probably call the uniformed personnel to cordoned [sic] off that area out there if you feel that there is a security problem." The judge then conceded: "No. It's a question of security regulations. I don't think there's a real security problem. But the marshals are not allowed — isn't that right — not allowed to do it. But I don't think there's a real security problem." App. 17a. The court held no hearing to determine whether a security issue required shackling and, in fact, found that there was no security reason for shackling. Nonetheless, the court required shackling under the misunderstanding that security regulations required shackling, whether or not there was a security concern.

At the scene, defense counsel stated: "I just want to put on the record an objection to this whole thing . . . I think it's inappropriate to have the view." App. 23a. The court then told the jury:

> You're perfectly free to look at whatever you want to. . . . What I mean is that *you're there to view evidence*. And anything that you want to look at or look through, that is if you want to look through the window, fine. If you want to go to a certain place and look through the window from that place, that's fine. Nobody is restricting you from doing that and [i]f you would feel comfortable putting your nose again [sic] the window or whatever else you want to do, that's entirely up to you . . . You are also in deliberations . . . Anything you want to look at, you can.

App. 25a-26a (emphasis added).

The jurors were admitted into the house by the Government's witness — the person whose credibility and capability was the reason the 12 jurors were at the house — so that each juror could obtain his or her own independent evidence of whether the witness could have seen what the witness purported to see. App. 22a. As the Government conceded in its brief in the Fourth Circuit, the judge, the court reporter, court personnel, and the attorneys were not present when the jurors, in groups of four, entered the witness's home, and did whatever they did. Appellee's Brief at 25.

In the 76-minute period from 12:45 p.m. to 2:01 p.m., the jurors: (1) ate lunch; (2) went to the van; (3) traveled to

the scene; (4) were admitted into the home by the Government's key witness; (5) viewed, in groups of four, whether a person could see the corner and, if so, whether a person could see whether someone had a gun; (6) deliberated in the van; (7) traveled back to the courthouse; (8) deliberated at the courthouse; and (9) returned a guilty verdict. App. 20a-27a.

At sentencing, the Government argued for enhancement for: (1) obstruction of justice, alleging petitioner committed perjury at the first trial; and (2) a crime of violence, alleging petitioner committed assault while in possession of a firearm. On March 2, 2000, the court granted the Government's request and sentenced petitioner to almost 22 years for being a felon in possession of a firearm. App. 28-30a.

REASONS FOR GRANTING THE WRIT

I. The first issue is a case of first impression for this Court, addressing the constitutional distinction between: (1) a "bare inspection" by a jury while deliberating; and (2) a deliberating jury obtaining new evidence and becoming witnesses. If this case is the latter scenario, as urged by petitioner, there are constitutional sub-issues of: (1) a defendant's right to be present when evidence is taken, as part of the Sixth Amendment right to confrontation and the Fifth Amendment right to due process; (2) a defendant's right not to be shackled in the presence of the jury when the court finds no security reason for shackling, yet shackles anyway because of "regulations," as part of the Sixth Amendment right to a fair trial and the Fifth Amendment right to be presumed innocent; (3) a defendant's right to cross-examine witnesses, even if they are also jurors, as part of the Sixth Amendment right to confrontation; and (4) a defendant's right to have counsel: (a) present when evidence is received; and (b) argue the impact of evidence during closing argument, as part of the Sixth Amendment right to effective assistance of counsel.

This Court has never addressed the first issue, which is the distinction between: (1) a jury conducting a "bare inspection;" and (2) a jury conducting a view that constitutes the taking of evidence, with the jurors becoming witnesses. In this case, the jurors were not conducting a bare inspection; they were obtaining evidence and becoming witnesses.

The Government's entire case of criminal agency was the testimony of Ms. Pompey. The jury was unable to resolve the dispositive factual issue of whether petitioner had a gun

because it could not resolve the issue of Ms. Pompey's: (1) credibility; and (2) ability to see, from the angle of her window, at 9:30 p.m., whether petitioner had a gun.

The juror who first requested to look out that window, stated: "[W]hat one person sees, another may not be able to see." App. 16a. The juror wanted to replace the witness's testimony as to what could be seen from the window with the juror's own testimony of what the juror could see from the window. Defense counsel's objection demonstrates that the jury's replacement of Ms. Pompey's view with the jury's own view — actually, its own 12 separate views — would be obtaining additional evidence and would not be a bare inspection. "[T]he issue is not what the juror sees. It's what Raynell Pompey saw." App. 16a.

The court recognized that the juror's requested view, during deliberations, in response to the jury's inability to resolve the case on the evidence before it, would be the taking of additional evidence on the issue of criminal agency. The court ruled that if what the witness purported to see was insufficient to resolve the case, the jurors could go to the scene, and each juror could replace his or her understanding of the witness's testimony of what the witness saw with his or her own new replacement testimony of what he or she could see from the window. Thus, this was not a case of a bare inspection, i.e., a view of a crime scene to provide perspective on the case. Instead, this view was for the purpose of obtaining the critical evidence needed to resolve the issue of guilt or innocence when, without this new evidence, the jury was unable to resolve the issue of guilt or innocence.

The court told the jury that "if it turns out in the course of deliberations that you decide . . . that in order to reach a

final decision, [you] have to look out the window, then [we'll] arrange that." App. 19a. Thus, the court was telling the jury to accept its offer if the jury could not find guilt, beyond a reasonable doubt, on the evidence that had been presented by the Government.

The fact that the jury accepted the court's offer demonstrates that the jury was implicitly rendering, at that time, a verdict of "not guilty," or — at best — was a hung jury. The court knew that a prior jury had been hung, and the court, in an attempt to avoid another hung jury, invited the jury to view extrinsic evidence, while deliberating, if it could not otherwise resolve the case.

The entire case of criminal agency depended on whether the jurors believed the Government's lone witness and, if so, believed that she could see, from the window, whether petitioner had a gun. The court told the jury that if it could not "reach a final decision" without looking through the window, then deliberations could be suspended so that each of the 12 jurors could become a witness, and make his or her own determination of criminal agency, as a substitute for the witness's testimony regarding criminal agency.

The final words from the court, to the jury, before its unsupervised entry into the house further demonstrates that the jury's interruption of its own deliberations was because the jury could not find guilt, beyond a reasonable doubt, on the evidence before it, and thus it needed to obtain additional evidence. "[Y]ou're there to view evidence. . . . If you want to go to a certain place and look through the window from that place, that's fine. . . . Nobody is restricting you . . . [F]eel comfortable putting your nose again [sic] the window or whatever else you want to do . . ." App. 25a-26a. The court

expressly told the jury that it was there to view evidence, and the jury is presumed to understand and follow the court's instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

The court permitted the jurors to decide whether the jury had sufficient evidence to resolve this case. If the jury lacked sufficient evidence to convict, the jurors could seek more evidence. If the testimony of the Government's lone eyewitness was insufficient to resolve the case, the jurors could have 12 additional witnesses, with each juror relying on one particular witness from among the 12 new witnesses.

Thus, the court approved 12 new witnesses to testify, during deliberations, as to what could be seen from the window. The testimony would be taken with no one present and would not be subject to cross-examination. Each new witness would testify as to his or her personal view of criminal agency, increasing from one to 13 the number of eyewitnesses. Because 12 of the 13 witnesses were also jurors, naturally, each juror would rely on the testimony of only one of the 13 witnesses, i.e., himself or herself.

Of course, the reason the jurors elected to replace the testimony of the Government's witness with their own testimony was because the Government's witness was the one witness whose testimony was insufficient to prove criminal agency. This was obvious from the jury's acceptance of the court's offer, having been unable to find guilt on the evidence before it. Thus, ultimately, the only witness whose testimony on criminal agency became irrelevant to the outcome of the case was the only witness put forth by the Government to establish criminal agency.

The only time that this Court has even remotely touched on the distinction between: (1) a bare inspection that was not evidence; and (2) a jury view constituting the taking of evidence, was 67 years ago in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964). In *Snyder*, the Court held that "there is no denial of due process as the result of a bare inspection in the absence of the defendant . . ." *Id.* at 110.

The *Snyder* Court expressly limited its holding to "a bare inspection and nothing more," *id.* at 108, and made clear that it was not addressing whether due process would be violated when particular features of the scene are brought to the jury's attention, and the jury is asked to make a particular observation. *Id.* The *Snyder* dicta recognized that the "inevitable effect [of a jury view may be] that of evidence, no matter what label the judge may choose to give it." *Id.* at 121.

In *Old Chief v. United States*, 519 U.S. 172 (1997), this Court stated: "Rule 401 defines relevant evidence as having 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Id.* at 178 (quoting Fed. R. Evid. 401). In this case, the view by the jury was the epitome of relevant evidence. Prior to the jury view, the jury was unable to decide the critical issue of criminal agency. However, as a consequence of the jury view, the jury was able to immediately — and unanimously — decide the critical issue of criminal agency.

The view that took place in petitioner's case was not a bare inspection designed to help the jury understand the evidence presented. Instead, it was a very structured view

designed to allow the jury to gather evidence and/or to become eyewitnesses, such as to agree with, or disagree with, the view alleged to have been seen by the Government's lone witness on criminal agency. The jury view had the specific purpose of having each member of the jury stand in the shoes of the witness and look through the eyes of the witness. The jury was in the room for the express purpose of looking out the window and making a determination as to whether, from that extreme angle, they could observe the street corner and whether they could determine if someone had a gun. When the jury is allowed to view that which the jury has not previously seen for itself, that constitutes the taking of evidence. *See United States v. Santana*, 175 F.3d 57 (1st Cir. 1999).

In *Snyder*, the Court was satisfied that due process was not violated because the defendant "could examine the bailiffs at the trial and learn what they had looked at." 291 U.S. at 108. In this case, no court personnel accompanied the jury into the room, so there was no neutral person to call as a witness and, in any event, the case had been closed, and there was no opportunity to learn anything about the jury viewing — or the three different viewings in groups of four or the 12 different viewings by individual jurors.

In *Snyder*, the Court was satisfied that as to any change of circumstances and its effect, cross-examination could bring out that information. 291 U.S. at 108-09. In this case, there was a change of circumstances, with potentially great effect, in that the viewing was to determine whether the witness could see the corner from that extreme angle and whether the witness could see whether anyone on the corner was in possession of a gun. The change of circumstances was that the incident took place in the dark at 9:30 p.m., yet

the viewing took place in the daylight at 1:30 p.m. Thus, unlike in *Snyder*, in this case, the case was closed and the jury was deliberating, so there was no subsequent cross-examination available.

In this case, the 12 jurors looking through the window to determine criminal agency was not a bare inspection. Instead, it was the taking of evidence. Thus, this Court is presented with four constitutional sub-issues, as follows: (1) the implication of the Sixth Amendment right to confrontation and the Fifth Amendment right to due process, based on a defendant's right to be present when evidence is taken; (2) the implication of the Sixth Amendment right to a fair trial and the Fifth Amendment right to be presumed innocent, based on a defendant's right not to be shackled in the presence of the jury unless there is a security need that outweighs that right; (3) the implication of the Sixth Amendment right to confrontation based on a defendant's right to cross-examine witnesses; and (4) the implication of the Sixth Amendment right to effective assistance of counsel based on counsel's right to be present when evidence is taken and right to argue the case to the jury.

First, the viewing by the jury to obtain evidence took place without petitioner present. The defendant has an absolute right to be present during every stage of the trial. *Portuondo v. Agard*, 529 U.S. 61, 65 (2000); *Pointer v. Texas*, 380 U.S. 400 (1965). This includes: (1) whenever evidence is received; (2) whenever there is communication between the court and the jury; and (3) whenever there is a jury viewing. *See United States v. Walls*, 443 F.2d 1220 (6th Cir. 1971).

In this case, the court presented petitioner with a Hobson's choice, ruling that petitioner could only obtain his constitutional right to be present, as part of his Sixth Amendment right to confrontation, if he were willing to be shackled in the presence of the jury. The court required shackles even though it conducted no hearing to determine whether such an extreme security measure was necessary and, in fact, conceded that there was no security requirement for the Hobson's choice that it gave petitioner.

In fact, when the detective explained to the court that arrangements could be made for petitioner to be present, if the court had a security concern, the court conceded that it had no security reason for mandating shackles, but it was doing so simply because it thought that there was a regulatory requirement for shackling. The court stated: "It's a question of security regulations. I don't think there's a real security problem. But the marshals are not allowed — isn't that right — not allowed to do it. But I don't think there's a real security problem." App. 17a.

Petitioner had an absolute right to be present when each of the 12 jurors went to window to obtain his or her own view of whether the witness could have seen petitioner with a gun. That right is guaranteed by the Due Process Clause of the Fifth Amendment and by the Sixth Amendment right to confrontation. In *Kentucky v. Stincer*, 482 U.S. 730 (1987), this Court stated:

> The Court has assumed that, even in situations where the defendant is not actually confronting witness or evidence against him, he has a due process right "to be present in his own person whenever his presence has a relation, reasonably

> substantial, to the fullness of his opportunity to defend against the charge." [D]ue process clearly requires a defendant be allowed to be present "to the extent that a fair and just hearing would be thwarted by his absence." Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.

Id. at 745 (quoting, in part, *Snyder*, 291 U.S. at 105-07).

Nothing was more critical to the outcome of this criminal proceeding than the jurors' viewing of the alleged crime scene from the window. The entire case came down to the testimony of one witness, who had three different versions — the grand jury, the first trial, and the second trial — of what she saw. The jury was unable to reach a verdict based on the testimony of the Government's witness, but the jury was able to reach a verdict after the court permitted each juror to become a witness, replacing the testimony that he or she had heard with his or her own testimony of what he or she saw from the window.

Second, petitioner had a Sixth Amendment right to a fair trial, requiring that he not be shackled in the presence of the jury unless the court held a hearing and found a need for security — requiring shackling — that outweighed petitioner's Sixth Amendment right to a fair trial. In this case, there was no finding of a requirement to shackle and, in fact, the court found to the contrary, stating twice that there was no need to shackle.

The court mistakenly believed that regulatory requirements mandated that it shackle petitioner even if there was no actual security need for shackling. Thus, the Hobson's choice — petitioner having to forego either his Sixth Amendment right to be present or his Sixth Amendment right not to be observed by the jury in shackles — was an unconstitutional imposition.

By ruling that petitioner had to be shackled, the court effectively denied petitioner the right to be present because petitioner could not then take the risk of being denied — by being observed by the jury in shackles — his Sixth Amendment right to a fair trial. Permitting the jurors to see petitioner in shackles would send the message that petitioner is so dangerous that everyone needs to be protected from him, even though he is constitutionally presumed to be innocent.

When a defendant is compelled to be shackled in the presence of the jury, his Sixth Amendment right to a fair trial and his Fifth Amendment right to the presumption of innocence, under the Due Process Clause, are both violated. *See, e.g., Holbrook v. Flynn*, 475 U.S. 560 (1986) (reversible error to have four uniformed state troopers sitting in the front row to supplement the courtroom security force); *Estelle v. Williams*, 425 U.S. 501, 512, *reh'g denied*, 426 U.S. 954 (1976) (reversible error to compel the defendant to be dressed in identifiable prison clothes).

As this Court recognized, shackling should be used as "a last resort" because of the distinct possibility of "a significant effect on the jury's feelings about the defendant." *Illinois v. Allen*, 397 U.S. 337, 344, *reh'g denied*, 398 U.S. 915 (1970). In this case, the trial court ruled that it

would shackle petitioner even though the court found that there was no security requirement for such shackling.

Third, unlike the Government's witness, whom petitioner could cross-examine, as part of his Sixth Amendment right to confrontation, petitioner could not cross-examine the jurors as to what each juror could or could not observe from the window. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("Confrontation Clause guarantees an *opportunity* for effective cross-examination") (emphasis in original). Petitioner could not cross-examine the jurors because: (1) they were jurors; (2) petitioner was not present when the jurors viewed the evidence (and nor was the judge, the court reporter, court personnel, or the attorneys); and (3) the case was closed and the jurors were in deliberation. Defense counsel had no opportunity to cross-examine the last minute witnesses who became witnesses in the very trial in which they were also deliberating as jurors. *See, e.g., Davis v. Alaska*, 415 U.S. 308 (1974).

Fourth, petitioner was denied the Sixth Amendment right to effective assistance of counsel, as his counsel: (1) was not present when the jurors received the new evidence; and (2) could not argue to the jurors about the new evidence because the case was closed and counsel had already presented his closing argument to the jury. *See Herring v. New York*, 422 U.S. 853, 858 (1975) ("There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial.").

II. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Court recognized that its holding would present the next due process issue of whether the "prescribed statutory maximum" for federal sentences is: (1) the maximum sentence under the statute; or (2) the maximum sentence under the Sentencing Guidelines, promulgated pursuant to congressional mandate, with the force and effect of law, and just as binding as if the sentence was set forth in the statute. Petitioner was sentenced beyond the maximum amount permissible for the offense charged, submitted to the jury, and found beyond a reasonable doubt. Petitioner thus presents this due process issue, and every federal judge, prosecutor, defense counsel, and defendant needs this question answered.

In *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court held that the Due Process Clause requires that elements be: (1) charged in the indictment; (2) submitted to the jury; and (3) proven beyond a reasonable doubt. Two terms ago, in *Jones v. United States*, 526 U.S. 227 (1999), this Court held that the Fifth Amendment Due Process Clause and the Sixth Amendment rights to notice and trial by jury likewise require that any fact necessary to trigger a higher sentence must be: (1) charged in the indictment; (2) submitted to the jury for its verdict; and (3) found beyond a reasonable doubt. *Id.* at 232-34.

In *Jones*, the Court recognized that the fact that the statute was "open to constitutional doubt in light of" *Winship* and *Mullaney* was sufficient reason to avoid the constitutional question and bring the statute within the scope of these cases. *Id.* at 239-42. The Court stated that "[t]he constitutional safeguards that figure into our analysis concern . . . the required procedures for finding the facts that determine the maximum permissible punishment." *Id.* at 243 n.6. "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties[. S]uch facts must be established by proof beyond a reasonable doubt. That is the essence of the Court's holdings in *In re Winship* [and] *Mullaney v. Wilbur*." *Id.* at 252-53 (citations omitted) (Stevens, J., concurring).

Last term, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), recognizing that its holding was foreshadowed by *Jones*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Moreover, the facts or circumstances necessary to produce the higher punishment must be expressly charged in the indictment with certainty and precision. *Id.* at 476.

In *Apprendi*, both the majority, *id.* at 497 n.21, and the concurrence, *id.* at 523 n.11, noted that *Apprendi*'s application to the federal Sentencing Guidelines was not before the Court. Nonetheless, its application to the Sentencing Guidelines was foreshadowed. The concurrence recognized that "the Guidelines 'have the force and effect of laws.' " *Id.* at 523 n.11 (quoting, in part, *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)) (Thomas, J., concurring). The dissent opined that

"the Court's opinion . . . will have the effect of invalidating . . . the Sentencing Guidelines that now govern sentencing by federal judges." *Id.* at 549-50 (O'Connor, J., dissenting).

The issue, in this case, is what is the "prescribed statutory maximum" for federal sentences, within the meaning of *Apprendi*, such that the Fifth and Sixth Amendments mandate charging petitioner in the indictment, submitting the issue to the jury, and making a finding beyond a reasonable doubt. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court found that the federal Sentencing Guidelines were constitutional when they were challenged on separation of powers grounds. Congress enacted the Sentencing Reform Act of 1984, which delegated the promulgation of guidelines for every federal crime to the federal Sentencing Commission.

Congress made the federal Sentencing "[G]uidelines binding on the courts, [which] permits the Government to appeal a sentence that is below that range." 488 U.S. at 367-68. "[T]he Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." *Id.* at 391. "There is no doubt that the Sentencing Commission has established significant, legally binding prescriptions governing application of governmental power against private individuals — indeed, application of the ultimate governmental power, short of capital punishment." *Id.* at 413.

In this case, petitioner was charged, in a one-count indictment, with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). Petitioner was not charged with either: (1) obstruction of justice; or (2) a crime of violence. Accordingly, these offenses were not submitted to the jury for a beyond a reasonable doubt finding.

Based on three prior convictions, petitioner was sentenced under section 924(e)(1), which provides for a minimum sentence of 15 years, i.e., 180 months. Although the statute provides no maximum sentence, it has been held to have a maximum sentence of life. *See United States v. Mack*, 229 F.3d 226 (3d Cir. 2000) (applying *Curtis v. United States*, 511 U.S. 485 (1994)).

Petitioner is an armed career criminal under U.S.S.G. § 4B1.4(b)(3)(B). Petitioner's offense level was 33 and his criminal history category was IV. As such, under the federal Sentencing Guidelines, petitioner's minimum sentence was 188 months and his maximum sentence, without enhancements, was 235 months.

Nonetheless, at sentencing, the Government requested a two-level enhancement, pursuant to U.S.S.G. § 3C1.1, alleging that petitioner was guilty of: (1) obstruction of justice, based on perjury during his first trial when he denied committing an assault; and (2) a crime of violence, based on an assault while in possession of a firearm. Even though: (1) petitioner was never charged with obstruction of justice or a crime of violence; and (2) the jury was never asked to make a finding of fact, beyond a reasonable doubt, as to whether petitioner committed obstruction of justice or a crime of violence, petitioner's sentence was enhanced, by the court, from: (1) between 188 and 235 months; to (2) 262 months.

In *Apprendi*, the Court stated that the "question presented is whether the Due Process Clause . . . requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *Id.* at 469. In *Apprendi*, the defendant was convicted of

unlawfully possessing a firearm in violation of a state statute. In addition to the statutory penalty for the firearm possession, the defendant was subject to a sentencing enhancement, based on racially motivated conduct not charged in his indictment. At sentencing, the trial court found that, based on a preponderance of the evidence, the defendant qualified for the enhanced sentencing penalties. *Id.* at 469-71.

In *Apprendi*, the Court quoted *Jones*, stating: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 476 (quoting *Jones*, 526 U.S. at 243 n.6). Writing for the Court in *Apprendi*, Justice Stevens characterized this issue as follows:

> [This is] a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentencing enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

530 U.S. at 476. *Apprendi* makes clear that the imposition of the sentencing enhancement violated petitioner's due process rights by permitting an enhanced sentence for conduct for which he had never been charged and which had never been submitted to the jury to decide whether such conduct took place, much less to a level of certainty beyond a reasonable doubt.

As noted by Justice Souter, writing for the Court in *Jones v. United States*, 526 U.S. 227 (1999):

> If a potential penalty might rise from 15 years to life on a non-jury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gate-keeping: in some case, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment.

Id. at 243-44.

After *Winship*, *Mullaney*, *Jones*, and *Apprendi*, this Court would be placing form over substance to hold that because Congress established the maximum sentence at life, and because petitioner received less than a life sentence, the Fifth Amendment Due Process Clause and the Sixth Amendment rights to notice and a jury trial are inapplicable. It was Congress that created the Sentencing Commission; it was Congress that delegated to the Sentencing Commission the task of establishing the minimum and maximum sentences; it was Congress that made the Sentencing Guidelines mandatory. Any judge that sentences outside the mandatory range, under the Sentencing Guidelines, is reversed, even though the sentence is within the statutory range. To hold that the federal Sentencing Guidelines do not establish the "prescribed statutory maximum" would be an artificial reading of *Apprendi*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record
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LAW OFFICES OF
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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED, DECIDED AND FILED JANUARY 24, 2001

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-4232

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MELVIN DOUGLAS WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, District Judge.
(CR-99-146)

Submitted: December 29, 2000

Decided: January 24, 2001

Before WILLIAMS and KING, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

* * *

Appendix A

OPINION

PER CURIAM.

Melvin Williams was convicted of being a felon in possession of a firearm in violation of 18 U.S.C.A. § 922(g) (West 2000) and sentenced to 262 months incarceration. Williams appeals both his conviction and his sentence. The conviction is challenged on the ground that a jury view of the scene of the offense violated Williams' Fifth Amendment right to a fair trial and his Sixth Amendment rights to confrontation, effective assistance of counsel and presumption of innocence. Concluding that the district court committed no reversible error in permitting the jury to view the scene without requiring the presence of the defendant, *see Snyder v. Massachusetts*, 291 U.S. 97, 108, 121 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964), and that no aspect of the manner in which the jury view was conducted prejudiced Williams, *see Arnold v. Evatt*, 113 F.3d 1352, 1361 (4th Cir. 1997), we affirm Williams' conviction.

Williams' sentence was properly enhanced under *U.S. Sentencing Guidelines Manual* § 3C1.1 (2000) upon a finding by the district court at the sentencing hearing that he obstructed justice by offering perjured testimony at his first trial. *See United States v. Dunnigan*, 507 U.S. 87, 95-96 (1993). The sentence was also properly enhanced under § 4B1.4(b)(3)(A) for use of a firearm in a crime of violence for which he was not convicted. *See United States v. Mellerson*, 145 F.3d 1255, 1257 (11th Cir. 1998); *United States v. Rutledge*, 33 F.3d 671, 673 (6th Cir. 1994).

Williams' reliance on *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), to challenge these enhancements is misplaced because the enhancements did not increase Williams' sentence beyond the applicable statutory maximum. *United States v. Kinter*, No. 99-4621, slip opinion at 14-16 (4th Cir. Dec. 19, 2000) (published).

We therefore affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the material before the court and argument would not aid the decisional process.

AFFIRMED

Appendix A

JUDGMENT

FILED: January 24, 2001

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 00-4232
CR-99-146

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

MELVIN DOUGLAS WILLIAMS

Defendant – Appellant

Appeal from the United States District Court for the District of Maryland at Baltimore

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED MARCH 3, 2000 AND FILED MARCH 7, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Case Number: MJG-99-0146

UNITED STATES OF AMERICA

v.

MELVIN WILLIAMS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Defendant's Attorney: Michael E. Marr

Assistant U.S. Attorney: James M. Webster, III
James Warwick

THE DEFENDANT:

* * *

☒ was found guilty on count 1 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:922(g)	Felon in Possession of Firearm	03/08/99	1

Appendix B

The defendant is adjudged guilty and sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SSN:
220-36-4907

March 2, 2000
Date of Imposition of Judgment

Defendant's Date of Birth:
12/13/41

s/ Marvin J. Garbis 3/3/00
MARVIN J. GARBIS Date
United States District Judge

Defendant's U.S.M. No.:
09669-016

Defendant's Residence Address:
8657 Winands Road
Randallstown, MD 21133

Name of Court Reporter:
Barbara Shaulis

Appendix B

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 262 month(s).

☒ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. §3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. §3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. §3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

Appendix B

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

STATUTORY CONDITIONS OF SUPERVISED RELEASE

The defendant shall not commit another federal, state, or local crime.

In any felony case, the defendant shall not possess a firearm as defined in 18 U.S.C. §921.

The defendant shall not illegally use or possess a controlled substance.

The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

If this judgment imposes any criminal monetary penalty, including special assessment, fine, or restitution, it shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid at the commencement of the term of supervised

release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol;

Appendix B

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix B

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$100.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; and (6) penalties.

* * *

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

☒ in equal monthly installments during the **second** year of supervision;

* * *

The U.S. probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

* * *

Appendix B

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

* * *

Guideline Range Determined by the Court (before departures):

Total Offense Level: 36
Criminal History Category: VI
Imprisonment Range: 324 to 405
Supervised Release Range: 3 to 5 years.
Fine Range: $20,000.00 to $200,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

Restitution is not ordered (or only partial restitution is ordered) because:

For all offenses regardless of when committed:

☒ No identifiable victim has suffered physical injury or pecuniary loss

* * *

☒ The sentence departs from the guideline range:

* * *

☒ for the following specific reason(s): The Criminal History Category VI overstates the seriousness of criminal history and likelihood of recidivism.

APPENDIX C — EXCERPTS FROM TRANSCRIPT OF TRIAL OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION DATED OCTOBER 25, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Criminal No. MJG-99-0146

UNITED STATES OF AMERICA

v.

MELVIN WILLIAMS,

Defendant.

Baltimore, Maryland
October 25, 1999
10:00 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE MARVIN J. GARBIS
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[47] * * *

MR. WEBSTER: Your Honor, we could have a jury view — we could take the jury over there and look out the window.

THE COURT: Well, the problem with that is only is logistics. Because there's no notice, the van isn't here. The van is off to Pennsylvania and that's a problem. Now one thing we can do is we can have, we could have counsel and I, we can go out there and take a picture. That's a start. As you understand if you don't litigate it now, you litigate it later. You understand that?

MR. WARWICK: Oh, I understand, judge. I'm just trying to think through what the easiest way to accomplish this would be.

THE COURT: Well, the easiest way may be to start with for us to drive out and take a look out the window with the camera.

[48] MR. WARWICK: Okay. My only hesitancy is and I haven't thought it through completely is making the Court a witness to certain events.

THE COURT: I'm not a witness. No, no. I'm just there to keep the peace.

MR. MARR: He's going to observe.

THE COURT: The only witness is going to be Mr. Utz who's going to take a photograph and Mr. Marr is going to watch him take a photograph.

MR. MARR: Well, can I have my witness take a photograph, too?

THE COURT: Well, if you're there and there's only one photograph, I'm not worried about that.

MR. WEBSTER: Your Honor, I don't know if this will help, but if counsel and the Court went there and we looked out the window and Your Honor could see that you can see the corner from there and Mr. Marr can see that you can see the corner from the window, there would be no need for this testimony. It would be misleading.

THE COURT: If the issue is whether you can see a, forget the corner, whatever that, whatever the dot is, whatever the lines are, there is some truth to that.

[49] MR. WEBSTER: Mr. Marr shouldn't be able to put on any evidence to the contrary if the three of us can see the dots.

THE COURT: Well, then we have to tell the jury what we're doing.

MR. MARR: Well, the difficulty with the dots, Your Honor, is that they appear on the photograph distorted from what reality is.

MR. WARWICK: That's the evidence that was adduced. You haven't adduced anything to the contrary, counsel.

MR. MARR: Oh, yes, I have. I've adduced this.

* * *

Appendix C

[54] THE COURT: Well, these are three notes written in three different handwritings by three different jurors. So I know that. All right. Then the other note is and I don't know who signed this. "I feel that it is important to actually visit the crime scene and see the view outside the window of 1405 because what one person sees, another may not be able to see. So my question is can we visit the scene and look out of the windows in 1405."

Well, I think we have made such a fuss about this that if the jury is asking for it, that tips the scale and we're going to do it. And Mr. Marr, if you want to object, put it on the record, although I will note that we started this proceeding by your requesting this and then now you're objecting to it, but —

MR. MARR: The evidence is closed. It's all over. We decided rationally and intelligently not to go out there and look at it. We closed the evidence. You have one juror and frankly, the question that she asked is pregnant with the reason as to why we shouldn't go because what one person sees, another may not be able to see. I mean the issue is not what the jurors see. It's what Raynell Pompey saw. That's the issue.

[55] THE COURT: Well, we haven't argued the case and if the jury asks for a view of the scene and we're talking about something that is within the city and apparently, we've got the logistics worked out. I'm going to let the jury have it. It's a jury request. Does the Government object?

MR. WEBSTER: No, Your Honor.

MR. WARWICK: No, Your Honor.

* * *

[58] * * *

THE COURT: Okay. Well, I think your sedan, you can take counsel. Me and counsel and my clerk I think we can get in for this brief trip. If Mr. Williams wants to come to the scene, the marshals will take him. Now he's going to have to be shackled.

MR. MARR: In front of the jury?

THE COURT: That's the security problem. They could stay in the car. I'll then describe what we're going to do.

DETECTIVE UTZ: Your Honor, if I may —

THE COURT: Yes.

DETECTIVE UTZ: If you would like, I can probably call the uniformed personnel to cordoned off that area out there if you feel that there is a security problem.

THE COURT: No. It's a question of security regulations. I don't think there's a real security problem. But the marshals are not allowed — isn't that right — not allowed to do it. But I don't think there's a real security problem. Okay. What we will do is we will arrange the — I think I'll go in with counsel and we'll have the reporter there, too, and the clerk. But my plan is that [59] whatever the

reasonable number of jurors is at a time, whether it's one, two or three, they'll come in, they'll look out the relevant window. And we'll tell them what to look — and we'll put somebody standing where that dot is on the street because I guess there's only one place. Isn't there?

MR. WARWICK: If I may make a suggestion?

THE COURT: Yes.

MR. WARWICK: I wouldn't even position anybody. I would just let them look out the window.

THE COURT: Well, I think that it is —

MR. WARWICK: Then it becomes subjective as far as in opening up a can of worms as to what Mr. Marr would contend was the location of a person. There are enough landmarks out there.

THE COURT: Okay. Well, if there's landmarks —

MR. WEBSTER: Corners, manhole covers.

THE COURT: All right. And there will be a photograph. So not only will they look, but there will be a photograph taken.

* * *

[64] * * *

Appendix C

THE COURT: Mr. Marr, if we're going to do this, if Mr. Williams were there, he'd have to be under restraint. I'm just wondering whether counsel, for this purpose we'd just have counsel.

MR. MARR: Well, I have already discussed that with my client and he does not want to be present in shackles, Your Honor.

THE COURT: All right. That's fine. Okay. . . .

* * *

[69] * * *

. . . We're going to have our instructions to you and then we're going to hear argument. But I want it to be very, very clear that if it turns out in the course of deliberations that you decide or some jurors decide that in order to reach a final decision, they have to look out the window, then you'll let us know and we'll be able to arrange that. Now that will take a little bit of time to arrange. You'll have to give us notice of that. That's where we are with that.

* * *

[154] * * *

(The jury commenced deliberations at 3:16 p.m.)

* * * *

APPENDIX D — EXCERPTS FROM TRANSCRIPT OF TRIAL OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION DATED OCTOBER 26, 1999

[commencing at page 159]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Criminal No. MJG-99-0146

UNITED STATES OF AMERICA

v.

MELVIN WILLIAMS,

Defendant.

Baltimore, Maryland
October 26, 1999
10:00 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE MARVIN J. GARBIS
UNITED STATES DISTRICT JUDGE, and a jury.

* * *

[160] PROCEEDINGS

MR. MARR: Good morning, Your Honor.

Appendix D

THE COURT: Good morning. Good morning. All right. The last note said that the jury wanted to see the scene and we're going to do it. After going around and around, the bottom line is that the clerk's office is going to arrange as soon as humanly possible for a bus and the jury and counsel, the reporter, the clerk will all go on the bus and we'll go out to the scene and we will have a camera for what's that worth. You'll take the pictures. We'll take the photographs if anybody — I guess we ought to take the exhibits, those exhibits and presumably — have you been there, Mr. Webster?

MR. WEBSTER: I've been to the house. I haven't looked out the window.

THE COURT: Well, Mr. Utz is here. I presume — how many people can comfortably go in the house and look out the window at one time, Mr. Utz?

MR. UTZ: Four.

THE COURT: All right. If they go in in groups of four and we'll have the exhibits with them and they'll all look out the window. The court reporter will be there. And counsel will be free to say, point out on the photograph what they want to [161] point out while they're looking out the window. All right.

MR. WEBSTER: We'll be free to comment while they're looking out the window?

MR. MARR: I would object to any —

Appendix D

THE COURT: It's going to be on the record. You don't want any comments?

MR. MARR: No. I mean I won't object to even going there. But I know that's preserved. But I don't think anybody should communicate with the jury at all except administratively.

THE COURT: All right.

MR. WEBSTER: I think they've been sworn in, judge. I don't think we should have any contact with them.

THE COURT: All right. They'll have the exhibits though. And they'll go in and they will look out the window and they can make notes of what they see.

MR. WEBSTER: Remember they have the exhibits now. So they need to be reminded to bring the exhibits with them.

THE COURT: Well, which exhibits do we want to retrieve because I think —

MR. WEBSTER: I would think all the [162] photographs and the maps.

THE COURT: The sketches. All right. It's arranged that Ms. Pompey will let us in?

MR. WEBSTER: Yes. She's at home, Your Honor.

Appendix D

THE COURT: She's not — okay. Nobody will speak to them and counsel will be there during the entire process. And we're doing the best that we can. All right. Mr. Marr, if your client went, he would have to be shackled. So he's not going to go. Right?

MR. MARR: That's correct, Your Honor.

THE COURT: Okay. That's fine.

* * *

[172] * * *

THE COURT: All right. We're on the record. We're on the scene at — we're on Hollins Street. All right.

MR. MARR: I just want to put on the record an objection to this whole thing because the jury is going in deliberations. I think it's inappropriate to have the view. And I also want to make sure that there is no communication of any kind from anybody. They should be allowed to look at what they want to look at without anybody encouraging them to look at anything in particular. They shouldn't be told to step anyplace or do anything. The judge I think is going to say that they should and this is okay with me, that they should not regard themselves as social [173] guests obviously, but they're viewing the scene and inspecting evidence. But other than that, I don't think there should be any communication at all.

MR. WEBSTER: I agree that counsel should not have any communication at all with the jury. The jury is in

deliberations. The judge is entitled to communicate with the jury during deliberations and I think if there is any communication necessary here, the judge should speak to the jury as he has in the courtroom. I also agree that the jury should not be told where to step, where to look. But I think the judge should tell them not to be concerned about where they're going or where they're looking. Feel free to go wherever you want. It's just the right they have at this point. I also want to put on the record that we are here because the issue, the issue of the site lines and visibility of the witness, the visibility of the street from the window was raised by the defense in the defense case. One of the jurors asked to view the scene during the evidence portion of the case before closing arguments were made. That request was made once before at the time the judge said that he would have the jury take a vote and he would make his decision based on vote. The jury voted. The [174] majority voted not to come. We did not come at that point. The judge then said if anybody during deliberations wanted to come out here, we could do that. And the Government considers this viewing a review of evidence that has already been admitted. That is the view of the street and that evidence is already in in the photographs that have been admitted into evidence.

MR. MARR: Let the record reflect that at the time the jury voted, I had objected to the view on behalf of the defense and that in fact it was the defense that recommended that the jury be polled in an effort to stop the view. And that's acceded, but we're here now.

* * *

Appendix D

[175] * * *

(Jury present.)

THE COURT: I'm just saying this for the record. Can you all hear me? You are here and this is the scene that you've heard about and seen photographs of. You're perfectly free to look at whatever you want to. We are going to go into this home and we can only do it four at a time because of the size of it. You are welcome to go in this home. But I don't want — I want to say this the right way. You are guests, but you're not social guests. What I mean is you're there to view evidence. And anything that you want to look at or look through, that is if you want to look through the window, fine. If you want to go to a certain place and look through the window from that place, that's fine. Nobody is restricting you from doing that and don't be embarrassed as if you were a guest in somebody's home. If you would feel comfortable putting your nose against the window or whatever else you want to [176] do, that's entirely up to you and nobody is concerned about that because you're here for a very serious purpose. You are also in deliberations. This means that you shouldn't discuss the case except for all of you together and without anybody else hearing your discussions. If after you have walked this block and if you have gone in and seen, any of you think any of you have questions or you want to see something else, you are to get in the van. You can write a note. We'll deal with it right here on the spot. I have all the photographs and exhibits here. I'm not telling you what to look at. But I would not want you to, I would not want you to come out here and say gee, I wish we had that photo. That's why they're all here. Anything you want to look at,

you can. If there's something that you want to take inside with you while you look out the window, that's fine, too. Just let us know whatever you want. So with that, I think we'll walk down to 1405. I want to go inside. She has to set up so that we can have this formally. And then we'll call the first four in and we'll do it. Three groups of four. Okay.

(In open court:)

THE COURT: Okay. They have reached the [176] verdict. So we can proceed to take the verdict.

(The jury entered the court room at 2:01 P.M.)

THE COURT: Okay. Welcome. Please be seated a second. I understand you've reached a verdict. Okay. The first thing I want to do is to thank you and I'd like to do that before we receive your verdict because it is the thanks are not for whatever verdict it is you've rendered. The thanks are for your time, your efforts, your attention and the verdict that you've arrived at conscientiously regardless of what the verdict is. We're going to take the verdict formally and afterwards, you're, of course, excused. It is my practice to meet with the jury after the trial and to discuss your experiences and how we can do things better. If you wish to wait, you'll wait less than 60 seconds and I'll be with you and we can talk about what we've done here. Anybody who feels as if they wish to leave and not wait to see me, that's all right, too. Right now let's take your verdict and I'll say a few other things.

Appendix D

THE CLERK: We're taking a verdict in Criminal Number MJG-99-0146. Would the foreperson please rise? Has the verdict form which was [178] submitted to the jury been answered?

THE FOREPERSON: Yes.

THE CLERK: Is it signed by you and dated?

THE FOREPERSON: Yes, it is.

THE CLERK: As I read the questions, would you please provide the answer? Do you find Mr. Williams guilty or not guilty of the charge against him?

THE FOREPERSON: Guilty.

* * * *

APPENDIX E — EXCERPTS FROM TRANSCRIPT OF SENTENCING HEARING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED MARCH 2, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MJG 99-0146

UNITED STATES OF AMERICA

vs.

MELVIN WILLIAMS,

Defendant

A sentencing hearing was held in the above referenced case on March 2, 2000 before the Honorable Marvin J. Garbis.

* * *

[67] * * *

THE COURT: All right. Well, I am not disrespectful of the guidelines. I think they are what we are going to follow and we are going to have to follow the dictates of the Fourth Circuit. I think this, that assuming, and I think that Mr. Marr should have this for the benefit of the Fourth Circuit.

If I were free to do so, I would depart to a sentence of 180 months. The reason is I don't know how to get there under the guidelines because I don't think the Fourth Circuit gives me the authority to depart that far.

But Mr. Marr, if you can persuade them that I do have the authority, then that is what I would depart to. I would give that because I think the mandatory minimum sentence is adequate.

[68] The add-on is necessary because of the unfortunate perjury, but beyond that I don't think there needs to be anymore.

I think that Pastor Butler, Pastor Reid, Mr. Miles, Senator Mitchell have all said things that are very, very meaningful, and there is a side of Williams that is very, very beneficial and we could benefit from having him available to helping the children.

I don't agree with everything Mr. Williams says, but that is fine, and he certainly disagrees with that case and that is fine. Mr. Marr, I hope that you can find a way to allow us to get there.

I think the most that I can do and I would do is to reduce the criminal history category to 4 because I do not see in this case the basis for boosting that.

I am still stuck with a sentence of 262 months. I don't want to give that. I think that it is far more than is needed, but I think that what is needed is the minimum plus a little bit, and Mr. Marr, I am asking you to present as well as you can to the Fourth Circuit the basis for allowing me to get to 180 months. I will be happy to do it. I think it is the right thing.

[69] I also think it would be meaningless for me to impose a sentence like that unless I can articulate a reason,

and I can't see that, but I think maybe the Fourth Circuit can, and maybe you can persuade them, so that is the sentence that I have to impose.

Now, with regard to supervised release, I believe we are talking about a period of five years supervised release. I don't know that Mr. Williams needs any special conditions. I don't think I would impose community service because I am confident that Mr. Williams could give community service and I wouldn't offend him by requiring him to do it.

There would be no fine. There is an assessment of a hundred dollars. That is mandatory. Mr. Marr, you can have that payable after, on supervised release if you want.

MR. MARR: I would like to have it payable after unsupervised release, Your Honor.

THE COURT: All right. That is fine.

Do you have anything else? Any other requests at this time?

MR. MARR: No other requests at this time.

MR. WEBSTER: Just for the record, what was the basis for the departure down to category 4?

THE COURT: I don't believe there was a basis, I think that the putting of a criminal history category 6 in view of Mr. Williams record, which in reality is not a large number of convictions, I know they are serious, I think that was excessive.

* * * *

APPENDIX F — INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED APRIL 6, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CRIMINAL NO. __
(Felon in Possession of a Firearm,
18 U.S.C. §922(g))

UNITED STATES OF AMERICA

V.

MELVIN WILLIAMS

INDICTMENT

The Grand Jury for the District of Maryland charges that:

On or about March 8, 1999, in the State and District of Maryland,

MELVIN WILLIAMS

the defendant herein, having been previously convicted of one or more crimes punishable by imprisonment for a term exceeding one year, did knowingly, intentionally, and unlawfully possess the following firearm in or affecting interstate commerce: a 9 millimeter Ruger handgun, serial number 311-41909.

18 U.S.C. §922(g)

Appendix F

LYNNE A. BATTAGLIA
UNITED STATES ATTORNEY

TRUE BILL:

FOREPERSON

DATE

APPENDIX G — RELEVANT STATUTES AND SENTENCING GUIDELINES

18 U.S.C. § 922(g)

§ 922. Unlawful acts

* * *

(g) It shall be unlawful for any person —

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien —

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the

Appendix G

Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that —

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of

physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * *

18 U.S.C. § 924(e)

§ 924. Penalties

* * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

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(2) As used in this subsection —

(A) the term "serious drug offense" means —

> **(i)** an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> **(ii)** an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive

device that would be punishable by imprisonment for such term if committed by an adult, that—

> **(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> **(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

U.S.S.G. § 3C1.1

§3C1.1. *Obstructing or Impeding the Administration of Justice*

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of

conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

* * *

U.S.S.G. § 4B1.4

§4B1.4. *Armed Career Criminal*

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from § 4B1.1 (Career Offender) if applicable; or

(3) (A) 34, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in § 4B1.2(a), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) 33, otherwise.*

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* If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

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(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or § 4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with a crime of violence or controlled substance offense, as defined in § 4B1.2(a), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.

* * * *

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or mor
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B							
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D							
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

BEST AVAILABLE COPY